Supreme Court U.S.
FILED
041497 APR 29 2005
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No.

IN THE

Supreme Court of the United States

LINA HA,

Petitioner,

v.

ALBERTO R. GONZALES,
U.S. Attorney General,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Lina Ha
312 N. 2nd Street, Apt. E
Alhambra, CA 91801-2329
626-457-1672

Questions Presented For Review

Did the United States Court of Appeals err by denying Petitioner's Petition for Review based on the following erroneous findings: (1) that the Immigration Judge did not err by denying her application for asylum based on lack of credibility; and (2) that the Immigration Judge did not violate Petitioner's Fifth Amendment right to Due Process by failing to consider her case on an individualized basis?

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Opinions Below

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit dated January 31, 2005, is set forth in the Appendix at page 1.

The unpublished Judgment of the United States Court of Appeals for the Ninth Circuit dated January 31, 2005, is set forth in the Appendix at page 5.

The unpublished Decision of the Board of Immigration Appeals dated December 19, 2002, is set forth in the Appendix at page 7.

The unpublished Oral Decision and Order of the Immigration Judge of the U.S. Immigration Court dated May 22, 2000, is set forth in the Appendix at page 9.

Statement of Jurisdiction

The judgment of the United States Court of Appeals was entered on September 8, 2004. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions at Issue

The question presented for review implicates the following provision of the Constitution of the United States:

Amendment V

No person shall be . . .deprived of life, liberty, or property without due process of law . . . .

Statutory Provisions at Issue

The question presented for review implicates the following statutory provision:

Section 101(a)(42)(A), Immigration and Nationality Act (8 U.S.C. § 1101(a)(42):

> The term "refugee" means:
>
> (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .

Statement of the Case

This case involves a judgment issued by the United States Court of Appeals for the Ninth Circuit on January 31, 2005, denying Petitioners' Petition for Review of an Order of Removal issued by an Immigration Judge and affirmed by the Board of Immigration Appeals.

Petitioner Lina Ha filed an application for asylum with the Immigration and Naturalization Service ("INS") on July 23, 1999. After INS rejected the application Petitioner was referred to the Immigration Court for removal proceedings, at which time Petitioner renewed her application for asylum.

A hearing was held before an Immigration Judge on May 22, 2000, in Los Angeles, at which time testimony was taken and evidence received. At the conclusion of the hearing, the Immigration Judge rendered an oral decision denying the application for asylum and for withholding of exclusion and deportation. Petitioner thereafter appealed to the Board of Immigration Appeals, which issued a decision on December 19, 2002, affirming the decision of the

Immigration Judge without opinion. Petitioner then filed a timely Petition for Review with the United States Court of Appeals on January 14, 2003. The United States Court of Appeals had jurisdiction to review the decision of the Board under 8 U.S.C. § 1252. On January 31, 2005, the Court of Appeals issued a decision denying the Petition for review.

Petitioner alleges that the Immigration Judge abused his discretion and violated her right to due process in conducting the hearing and erred in denying her application for asylum.

Petitioner, a citizen of The People's Republic of China, entered the United States on April 26, 1997. In 1999, Petitioner became fearful of returning home; she filed an application for asylum on July 23, 1999, alleging that she would be persecuted if she returned to China due to her involvement in illegal religious activities.

According to the U.S. Department of State, the government of China continues to attempt to control the growth of unapproved religious activity. The growth of unofficial churches is perceived as a threat to Communist Party authority. Followers of unsanctioned churches have been subject to fines, interrogation, detention, beatings and torture.

Prior to coming to the United States, Petitioner worked for a private company in China which had an office in Southern California. In China she became involved in a Christian "house church." In October 1996, Petitioner organized a church meeting at her house. During this service police came to the house and arrested Petitioner as an organizer of an illegal Christian meeting.

Petitioner was detained for six days during which time she was interrogated regarding members of her church group and also asked to admit that her group was against

the government. When she refused, she was physically beaten and threatened. When she was finally released, she was required to report to the local authorities once a week and warned not to organize any more house church meetings.

With the help of her manager who was sympathetic to her plight, Petitioner obtained a visa to go to the United States where she continued to work for her employer, which had a branch office in California. Petitioner arrived in the United States on April 26, 1997.

Once in the United States Petitioner became involved with a church and attended services on a regular basis. Concerned about family and friends who were involved in her church group in China, after several months Petitioner returned to China using an excuse that she had to return for business reasons. She took religious materials with her to distribute to her fellow church members.

One week after she returned to China, the police came to Petitioner's home, threatened her not to organize any house church meetings, and demanded that she surrender her passport. After a few days Petitioner left her home and went into hiding, staying with relatives of one of her Christian friends. During this time Petitioner reported to her employer and performed some work from where she was in hiding. After several weeks, and again with her employer's assistance, Petitioner fled China and returned to the United States. Petitioner continued to work for her employer's branch office in California until 1998.

In 1999, conditions changed in China when the government began a major crackdown on unauthorized social and religious groups, including Falun Gong practitioners, Catholic churches and house churches. Prior to this crackdown, Petitioner had hoped to be able to return to China but became afraid after learning that the police had

come to her home looking for her. She also learned that one of her Christian friends had been arrested. Petitioner then filed an application for asylum with INS on July 23, 1999. After INS rejected the application Petitioner was referred to Immigration Court for removal proceedings, at which time she renewed her application for asylum.

In his decision denying Petitioner relief from removal, the Immigration Judge found Petitioner not credible, describing her story as "fantastic." The Immigration Judge also remarked in his decision that "[t]he respondent's is one of many cases pending and recently heard in the Los Angeles Immigration Court from educated talented Chinese professionals claiming asylum subsequent to the expiration of their business visas."
policy.

Petitioner raised the due process and abuse of discretion issues in her appeal to the Board of Immigration Appeals and in her petition for review to the Court of Appeals.

Reasons for Granting the Writ

This Court should grant the writ of certiorari and review the decision of the Ninth Circuit Court of Appeals in this case. The Court of Appeals found that the Immigration Judge's denial of asylum based on an adverse credibility determination was supported by substantial evidence. This decision, however, was based on a gross violation of Petitioner's due process rights. The Immigration Judge violated Petitioner's 5th Amendment right to Due Process by prejudging her claim and thereby not evaluating her case on an individualized basis. The Immigration Judge stated in his decision that Petitioner's case was one of many similar cases from educated Chinese professionals in the Los Angeles court. It appears that the

judge decided Petitioner's case based on its similarity to other cases, which were not relevant to the decision in this case. This violated Petitioner's rights to a fair hearing and an individualized decision by an unbiased decision-maker. This action constitutes an abuse of discretion and a violation of Petitioner's due process rights.

A. Denial of Asylum Claim

1. Eligibility for Asylum

To qualify for political asylum under the Immigration and Nationality Act ("INA"), an alien must demonstrate a "well-founded fear of persecution." INA § 208(a), INA § 101(a)(42)(A); 8 U.S.C. §§ 1158(a), 1101(a)(42)(A).

A person who has suffered from past persecution is presumed to have a well-founded fear of future persecution. Osorio v. INS, 99 F.3d 928 (9th Cir. 1996). This presumption may be rebutted by a showing that country conditions have changed so that the applicant would no longer have a well-founded fear of future persecution. Matter of X-P-T, Interim Decision 3299 (BIA 1996). If the presumption is not rebutted, the petitioner is eligible for asylum. Osorio, supra, 99 F.3d 928.

2. Standard of Review

The standard of review for credibility determinations is a substantial evidence standard. Osorio, supra, 99 F.3d 928. The Court of Appeals accords substantial deference to credibility findings, but these findings must be supported by "specific, cogent reasons." Turcios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987). The reasons offered must be "substantial and must bear a legitimate nexus to the finding." Aguilera-Cota v. INS, 914

F.2d 1375, 1381 (9th Cir. 1990). The Court is also bound to consider "whether or not the reasons given are 'valid grounds' for determining that a witness is not credible." Nasseri v. INS, 34 F.3d 723, 726 (9th Cir. 1994). In cases in which "the petitioner's testimony is the principle source of evidence, it is especially important 'that the credibility determination be based on appropriate factors.'" Id. (citing to Aguilera-Cota, 914 F.2d at 1381.) Trivial errors by an asylum applicant do not constitute "a valid ground upon which to base a finding that an asylum applicant is not credible." Martinez-Sanchez v. INS, 794 F.2d 1396, 1400 (9th Cir. 1986)(quoting Damaize-Job v. INS, 787 F.2d 1332, 1337 (9th Cir. 1986)).

3. **Petitioner's Credibility**

The Immigration Judge erred by concluding that petitioner's account was not credible. Petitioner testified that she was arrested for organizing a Christian "house church" in China; that she was detained for six days during which time she was interrogated regarding members of her church group and also asked to admit that her group was against the government. When she refused, she was physically beaten and threatened. When she was finally released, she was required to report to the local authorities once a week and warned not to organize any more house church meetings.

While the Immigration Judge found that there was "insufficient proof of past persecution," it has been held that custodial interrogation can constitute persecution where it is abusive. Singh v. Ilchert, 69 F.3d 375 (9th Cir. 1995).

Petitioner submits that interrogation which includes her face being struck against a wall is sufficiently abusive to constitute past persecution; consequently, the

Immigration Judge's finding in this regard is clearly erroneous.

The Immigration Judge found her story to be "fantastic" and not believable. Petitioner contends, however, that there is nothing incredible about her story. Rather, the Immigration Judge seized on small parts of her story, which may, viewed out of context, appear strange or unlikely. Viewed as a whole, however, there is nothing about her story which compels the conclusion that her claim is untrue.

Petitioner became involved with one of many flourishing Christian "house churches" in China. At first she met with fellow worshipers at a friend's house. Later she organized a meeting at her house. During this meeting, the police came and arrested her. They interrogated her, and when she refused to provide the information they wanted, they physically beat her. After six days she was released, ordered to report to the authorities, and warned not to organize any further house church meetings.

Petitioner's manager at her job happened to be a friend of one of her fellow church members, and, since the company had a branch office in the United States and Petitioner was a good employee, he arranged for her to be sent there to work.

Petitioner submits there is nothing about her claim which is incredible. She found herself in trouble with the authorities, was questioned and beaten, was afraid she would continue to be harassed and persecuted in the future, and sought help from her manager at work who was sympathetic. He was able to help her by transferring her to the company's office in the United States.

After she was in the United States for some time, Petitioner became increasingly concerned about her family and her Christian friends back in China. She wanted to

visit them in person and take religious materials to them. As her son testified, she "made an excuse on business" to justify the trip back to China. While there the police came to her house and warned her again about taking part in religious activities. After a few weeks she returned to California and went back to work there.

A reasonable person might question why Petitioner would return to China if she feared persecution. The Immigration Judge also noted that if the authorities were at all interested in her they could have easily tracked her down by following her friends and family. Petitioner never indicated, however, that she was on the country's top ten wanted list; Petitioner's fear may have been real even if the authorities were only minimally interested in her.

Finally, and most importantly, the Immigration Judge did not fully consider the effect of the change in circumstances which occurred in 1999. While the Immigration Judge can question Petitioner's claims, he cannot ignore the reality of the Chinese government's increased suppression of religious groups which in part was triggered by the rise of the Falun Gong movement.

In this case, Petitioner presented sufficient evidence to establish she is qualified for asylum and withholding of removal as a victim of past persecution on account of her religious activities. Petitioner provided the Immigration Judge with testimony regarding the persecution she suffered as a result of her religious activities and the future persecution she feared if forced to return to China.

B. Due Process Violation

The Fifth Amendment guarantees due process in INS proceedings. Jacinto v. INS, 208 F.3d 725, 727 (9th Cir. 2000) (citing Campos-Sanchez v. INS, 164 F.3d 448,

450 (9th Cir. 1999)). "An alien who faces deportation is entitled to a full and fair hearing of his claims and a reasonable opportunity to present evidence on his behalf." Colmenar v. INS, 210 F.3d 967, 971 (9th Cir. 2000). A full and fair hearing requires that the alien's claim is "evaluated on its own merits to determine whether the alien's factual support and concrete evidence are sufficient" to meet her burden of proof. Sarvia-Quintanilla v. INS, 767 F.2d 1387, 1392 (9th Cir. 1985); see also Castillo-Villagra v. INS, 972 F.2d 1017, 1023 (9th Cir. 1992)(finding error when the BIA failed to consider alien's asylum application on an individualized basis).

The due process standard is supported by the statutory scheme governing immigration proceedings, which provides aliens with "a reasonable opportunity to examine the evidence against [them], to present evidence on [their] own behalf, and to cross-examine witnesses presented by the Government." 8 U.S.C. § 1229a(b)(4)(B) (2000).

The standard of review of due process violations in deportation proceedings is a de novo review. Sanchez-Cruz v. INS, 255 F.3d 775, 779 (9th Cir. 2001).

In this case, Petitioner submits that the Immigration Judge violated her 5th Amendment right to a individualized determination by an unbiased decision-maker. The Immigration Judge prejudged her case, stating that hers is one of many pending similar cases in Los Angeles involving well educated Chinese aliens. Petitioner submits that the judge's evaluation of the facts in her case had to have been influenced by his belief that her case was just like all the other cases involving well educated Chinese aliens. Such a mass condemnation does not comport with due process and should be rejected by this Court.

Conclusion

For the reasons set forth above, Petitioner Lina Ha respectfully prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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626-457-1672

FILED
JAN 31 2005

CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINA HA,	)	No. 03-70223
	)	
Petitioner,	)	Agency No.
	)	A75-644-823
v.	)	
	)	MEMORANDUM*
JOHN ASHCROFT,	)	
Attorney General,	)	
	)	
Respondent.	)	
	)	

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted September 13, 2004**

Before: SKOPIL, FARRIS, and BOOCHEVER, Circuit Judges.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Lina Ha, a citizen and native of China, petitions for review of the final removal order of the Board of Immigration Appeals ("BIA"), which affirmed without opinion the decision of an Immigration Judge ("IJ") finding Ha not credible and denying her application for asylum, withholding, and Convention Against Torture relief. We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

We review the IJ's decision because the BIA

affirmed summarily. See Khup v. Ashcroft, 376 F.3d 898, 902 (9th Cir. 2004). Our review is deferential, requiring only a "legitimate articulable basis to question the petitioner's credibility, and . . . a specific, cogent reason for any stated disbelief." Malhi v. INS, 336 F.3d 989, 992 (9th Cir. 2003) (quotations omitted).

The IJ gave a number of legitimate bases for disbelieving Ha's testimony, and supported them with specific examples. He noted that although she testified she had been persecuted on religious grounds, she returned to China the same year with religious materials, claiming she was motivated by business although she could have sent or faxed in her report from the California branch office of her employer. Ha's testimony about her employer's level of knowledge about her claimed persecution and his support for her was inconsistent and implausible. For example, Ha claimed that in 1997 she returned to the United States

without his knowledge although he had summoned her back to China. Ha's late application for asylum was not explained by the letter from her husband, which appeared to have been prepared only for the purpose of supporting her asylum application. Without corroborating documents to overcome the weaknesses in her testimony, Ha did not show that the evidence compelled a contrary conclusion that would overcome our deference to the IJ's credibility determination. See Malhi, 336 F.3d at 993.

We also conclude that Ha was not denied due process, because the IJ did consider her case at length on its individual merit.

PETITION FOR REVIEW DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINA HA,	)	No. 03-70223
	)	Agency No.
Petitioner,	)	A75-644-823
	)	
	)	
v.	)	
	)	**JUDGMENT**
JOHN ASHCROFT,	)	
Attorney General,	)	
	)	
Respondent.	)	

Upon Petition for Review of a Decision of the

Board of Immigration Appeals

This cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the petition for review of the said decision of the Board of Immigration Appeals in this cause be, and hereby is **DENIED**.

Filed and entered Monday, January 31, 2005

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A75-644-823-Los Angeles

Date:
DEC 19 2002

In re: HA, LINA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Perliss, Sanford

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond

that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

s/ Patricia A. Cole
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File Nos. A 75-644-823 (Lead Respondent Female)
A 75-644-824

In the Matters of

Lina HA	)	IN REMOVAL
Guang YANG	)	PROCEEDINGS
	)	
Respondents	)	

CHARGE(S): Section 237 (a) (1) (B) of the Immigration and Nationality Act -
Nonimmigrants - remained longer than permitted

APPLICATION(S): Asylum, withholding of removal, voluntary departure

ON BEHALF OF RESPONDENTS:

Thomas D. Shambaugh
Attorney at Law

ON BEHALF OF INS

Debra Benedict
Assistant District Counsel

ORAL DECISION AND ORDER OF THE IMMIGRATION JUDGE

The respondents are mother and son, both are natives and citizens of the People's Republic of China. The United States Immigration and Naturalization Service (INS) has brought these removal proceedings against the respondents under the authority of the Immigration and Nationality Act (the Act). Proceedings were commenced with the filing of the Notices to Appear (NTA) with the Immigration Court. See Exhibit 1; 8 C.F.R. § 3.14(a).

The respondents admit as alleged in the Notices to Appear that they were admitted into the United States as nonimmigrants and stayed longer than authorized by the INS. Both respondents concede removability as nonimmigrant overstays. Removability is established in each case by clear and convincing evidence and was not an issue in either case. Section 240(c)(3) of the Act. The respondents declined to designate a country of deportation, and the People's Republic of China was directed. The respondents applied for relief from deportation in the form of asylum under section 208(a) of the Act.[1] The male

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1. It is clear that the respondent last entered the United States in November of 1997 and the Form I-589 was not filed until May 26, 1999, more than one year from that entry. As such the Court ordered the respondent to submit a written statement or brief if the respondents wished to

respondent is a derivative applicant of his mother's claim. Applications for asylum shall also be considered as applications for withholding of removal under section 241(b)(3) of the Act. The respondents also request withholding of removal under the Convention Against Torture. The respondents request voluntary departure under section 240B(b) of the Act in the alternative.

The lead respondent's Form I-589 application for asylum is contained in the record as Exhibit 2 (the lead respondent will hereinafter be referred to as respondent). Prior to admission of the application and supporting affidavit the respondent confirmed in Court that she knew the contents of her application and she was given an opportunity to make any necessary corrections. The respondent then swore or affirmed before me that the contents of the application, as corrected, including the attached documents and supplements, were all true and correct to the best of her knowledge.

STATEMENT OF THE LAW

The burden of proof is on the respondent to establish that she is eligible for asylum or withholding of removal under

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claim an exception to the one year filing rule. In response to the written request for an exception the INS indicated at the March 16, 2000, that the INS did not consider the respondent's application to be late. While I do not understand the INS's position, as the motion is unopposed, and considering the discretionary nature of the exceptions to the one years filing deadline, I will abide by both side's request to consider this an asylum application.

section 241(b)(3) or the Convention Against Torture.

A. Withholding under section 241(b)(3) of the Act

To qualify for withholding of removal under section 241(b)(3) of the Act, the respondent's facts must show a clear probability that her life or freedom would be threatened in the country directed for deportation on account of race, religion, nationality, membership in a particular social group or political opinion. This is the same language which previously governed withholding of deportation claims under former section 243(h) of the Act, and prior case law on withholding therefore appears to remain relevant. See INS v. Stevic, 467 U.S. 407 (1984). This means that the respondent's facts must establish it is more likely than not that she would be subject to persecution for one of the grounds specified.

B. Asylum under section 208 of the Act

To qualify for asylum pursuant to section 208 of the Act the respondent must show that she is a refugee within the meaning of section 101(a)(42)(A) of the Act. See Section 208(a) of the Act. The definition of refugee includes a requirement that the respondent demonstrate either that she suffered past persecution of that she has a well-founded fear of future persecution in her country of nationality or last habitual residence on account of one of the same five statutory grounds. The alien must show she has a subjective fear of persecution and that the fear has an objective basis. The objective basis of a well-founded fear of future persecution is described in the regulations as a "reasonable possibility of suffering such persecution" if the alien were to return to his home country. 8 C.F.R. §

208.13(b)(2). The objective component must be supported by credible, direct, and specific evidence in the record. DeValle v. INS, 901 F.2d 787 (9th Cir.1990). The alien must also be both unable and unwilling to return to or avail herself of the protection of her home country because of such fear. Finally, an applicant must also establish that she merits asylum in the exercise of discretion. See Matter of Pula, 19 I&N Dec. 467 (BIA 1987).

The regulations further provide that in evaluating a claim of future persecution the Immigration Judge does not have to require the alien to provide evidence she would be singled out individually for persecution if the alien establishes that there is a pattern or practice in her home country of persecution of groups of persons similarly situated to the applicant on one of the 5 enumerated grounds, and that the alien is included or identified with such group. 8 C.F.R. § 208.13(b)(2).

The regulations also note with respect to past persecution, that an alien who establishes she suffered past persecution within the meaning of the Act shall be presumed to have a well-founded fear of persecution. The presumption may be rebutted if a preponderance of the evidence establishes that, since the time the persecution occurred, conditions in the applicant's home country have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return. An alien who establishes past persecution, but not ultimately a well-founded fear of future persecution, will be denied asylum unless there are compelling reasons for not returning him which arise out of the severity of the past persecution. 8 C.F.R. § 208.13(b)(1); see also Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

The well-founded fear standard required for asylum is more generous than the clear probability standard of withholding of removal. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). We first, therefore, apply the more liberal "well-founded fear" standard when reviewing the respondent's application, because if he fails to meet this test, it follows that he necessarily would fail to meet the clear probability test required for withholding of removal.

C. Withholding / deferral of removal under the Convention Against Torture

In adjusting the request for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture") I have applied the regulations at 8 C.F.R. Part 208, particularly sections 208.16, 208.17, and 208.18. See 64 Fed Reg. 42247 (1999). "An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under 208.16(c), and, if applicable, may be considered for deferral of removal under section 208.17(a)." 8 C.F.R. section 208.18(b)(1).

Among the important tenants of this law are the following:

> Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any

> reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

8 C.F.R. section 208.18(a)(1).

To constitute torture, the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. section 208.16(a)(6). The pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. section 208.18(a)(1). "Acquiescence" requires that the public official have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. section 208.18(a)(7). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from lawful sanctions. 8 C.F.R. section 208.18(a)(2) and (3).

In order to constitute torture, mental pain or suffering must be "prolonged." 8 C.F.R. section 208.18(a)(4). It also must be caused by or resulting from intentional or threatened infliction of severe physical pain or suffering, threatened or actual administration or application of mind altering substances or similar procedures, or threatened imminent death. Id. These causes or results can be directed towards the applicant or another. Id.

The applicant for withholding of removal under the Convention Against Torture bears the burden of proving that it is "more likely than not" that he or she would be

tortured if removed to the proposed country of removal. 8 C.F.R. section 208.16(c)(2). In assessing whether the applicant has satisfied the burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal. 8 C.F.R. section 208.16(c)(3)(i-iv).

CREDIBILITY

A. General Law

An Immigration Judge's finding regarding the credibility of a witness is ordinarily given significant deference since the judge is in the best position to observe the witness' demeanor. Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998); Matter of Kulle, 19 I&N Dec. 318 (BIA 1985); Matter of Boromand, 17 I&N Dec. 450 (BIA 1980).

The testimony of an applicant for asylum may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and

sufficiently detailed, in light of general conditions in the home country, to provide a plausible and coherent account of the basis for the alleged fear. Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989). An applicant cannot, however, consider corroborating material to be merely superfluous or optional. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of Dass, 20 I&N Dec. 120 (BIA 1989). A finding of credible testimony is not dispositive as to whether asylum should be granted; rather, the specific content of the testimony and any other relevant evidence is considered. Matter of E-P-, 21 I&N Dec. 860 (BIA 1997). See Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998) (the weaker an alien's testimony, the greater the need for corroborative evidence; testimony lacking in specific detail; significant omissions in the written application).

Credibility determination must be based on a "rational and supportable connection between the reasons cited and the conclusion that the petitioner is not credible." Aguilera-Cota v. U.S. INS, 914 F.2d 1375, 1381 (9th Cir. 1990). An adverse credibility finding can be based on inconsistent statements and fraudulent documents. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); see also Leon-Barrios v. INS, 116 F.3d 391, 393-94 (9th Cir. 1997) (upholding adverse credibility finding where differences in asylum applications related to "heart" of asylum claim). Where such circumstances exist, it is appropriate for an Immigration Judge to make an adverse credibility determination. Matter of S-M-J-, supra; see generally Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987); Damaize-Job v. INS, 787 F.2d 1332, 1338 (9th Cir. 1986); Matter of B-, 21 I&N Dec. 66 (BIA 1995). A trier of fact's determination that testimony lacks credibility must be accompanied by specific, cogent reasons for such a finding.

Turcios v. INS, 821 F.2d 1396, 1399 (9th Cir. 1987); Figeroa v. United States INS, 886 F.2d 76 (4th Cir. 1989); Matter of A-S-, supra.

ANALYSIS AND FINDINGS

The respondent's is one of many cases pending and recently heard in the Los Angeles Immigration Court from educated talented Chinese professionals claiming asylum subsequent to the expiration of their business visas. The respondent is a well dressed, university educated, manager of a private international advertising company based in communist China who came to the United States, went back to China, returned to the United States, and then simply stayed in the United States with her son when their L-1 visas expired. An application for asylum was not filed until more than one year after the respondent's last entry. Each case must be carefully evaluated on its individual merits. Having reviewed the evidence of record the Court concludes that the respondent was not credible and her evidence does not establish a credible claim of fear based on religion or political opinion. She is an economic refugee looking for better opportunities for her and her son than are available in communist China.

The applicant was not credible. First her actions do not suggest a subjective fear of persecution. She originally came to the United States in April of 1997. She did not file an application for asylum even though she alleges the trip itself was a generous effort on the part of her employer to get her out of the country to save her from further persecution from the authorities. Then, only 6 months later she *returned* to China in October of 1997 in order to file a

business report, bring her friends some books or pamphlets, and to arrange her son's return to school in China. This does not sound like an alien fleeing persecution in China.

The respondent returned to the United States in November of 1997. Again she did not file for asylum even though she alleges that during this one month in China the authorities threatened her, told her to relinquish her passport, that she had to go into "hiding," and that the authorities came looking for her again. When the respondent's authorized stay under her L-1 visa expired in January of 1998 she stayed in the United States and her son continued his education. But she still did not file an asylum claim. In fact, she stated that she did not even intend to file an asylum claim even well into 1999.

The respondent's alleged reason for finally changing her mind and filing for asylum is completely contrived. She claims that she changed her mind when she received a letter from her husband stating that two friends had been arrested for attending the Falun Gong protest and that the authorities had come looking for her. First, with all that had allegedly happened to the respondent already, and considering she had no contact with the Falun Gong, it appears unlikely that the respondent would only now feel that turning to asylum was appropriate. Second, the letter from the husband is a letter obviously written for the eyes of a third person, not the respondent, as if prepared solely for the purposes of these proceedings: for example "Lat year when you came to visit us, because of your participation in Christian activities, and promotion of Christianity, the public security police repeatedly questioned you, and ordered you to submit your passport to them. They tried to detain you and investigate your case." I give the letter little weight as a

genuine and personal plea from respondent's husband to the respondent that changed her mind about filing for asylum, and her attempt to characterize it as such undercuts her credibility.

The respondent claims that she was arrested at home and detained for 6 days beginning October 6, 1996. After her release and after she sought medical attention she returned to work at the New Century Advertising Company. She alleges that her manager employer asked why she was so stubborn and then reduced her wages and medical benefits, but only because he was required to by regulation. The respondent alleges that her manager did not want to reduce her benefits because he sympathized with her situation. She also alleged that the owner of the company was a friend of one of the respondents' Christian sisters. The respondent alleges that because her manager was sympathetic to her he arranged for her to be sent as a manager for the company at their San Gabriel, California, office.

The respondent then claimed that this same employer, who was allegedly so sympathetic to her he sent her to the United States to save her, then *called her back* to China for no other reason than to give a report on how things were going in the San Gabriel office, a report which could have been mailed or faxed to the office. When asked why her employer would do this knowing full well that returning her would subject her to the Chinese authorities including to answer why she had not reported weekly to the police as she allegedly was supposed to, the respondent answered that her employer *forgot* about that and so did she. Forgot? This is not credible.

Meanwhile, the respondent's son, when he came back at the

next hearing to testify, offered the story that his mother "made an excuse on business" to return to China. This is inconsistent with, and does not rehabilitate, the lead respondent's contradictory testimony. The lead respondent had also testified that friends came to her home after the arrest for meetings while her son specifically stated there was only the one meeting.

The respondent also alleges that the primary purpose of returning to China in October of 1997 was to bring religious materials to her friends. When asked why she would put not only herself but her son and husband at potential risk instead of just trying to mail the materials, she said she would rather deliver them in person and that she wanted her son to return to his schooling in China anyhow. This does not support either a subjective fear of return to China for fear of persecution or an objectively reasonable action of someone fearing persecution. The story is not plausible.

When the respondent did return she said she went to work for just one day before she alleges she went into "hiding" from the police at the residence of a relative of one of her Christian friends. She claims that her employer did not know where she was but that she still did work for the company and had her *parents* courier it to work. During this time the respondent also allegedly distributed the religious materials she brought with her. It is not plausible that the police, if they were at all interested in finding the respondent, especially if they thought she was organizing to overthrow the government as the respondent claims, could not find her by watching the movements of her parents and friends.

The respondent alleges that she used her L-1 visa to return to the United States without her employer even knowing or authorizing the trip. And then she returned to work in San Gabriel and no one even says anything to her, not even so much as a description that the police had come to her employment looking for her. This is fantastic story and not credible.

The respondent has not explained why she would have no difficulty leaving the country in her own name when she was allegedly being searched for by the police. The police knew she had an L-1 visa which could be used for a return trip. They also knew she had not surrendered her passport as they requested. A simple check at the airport for would have been sufficient to stop her.

Accordingly, the respondent is not found to be credible. There is insufficient corroborative documentation (medical proof, proof of detention, proof of alleged friends' arrest, etc.) to overcome the lack of credibility. The simple suggestion on this record is that the respondent and her husband are professional people allowed to rise high in employment and education in communist China. She received the opportunity to come to the United States on business. The government made no attempt to stop her. She comes to the United States and even returns as business requires until the business visa expires. Only then, based on the contrived evidence of a "letter" from her husband, does the respondent file for asylum because that is all that is available to her. Should she receive it, she could file a visa petition for her husband.

As an alternative basis of denial - that is, even if the inconsistencies, lack of credibility and implausibilities on

this record could somehow be explained away (which they were not on this record) -- there is still insufficient proof of past persecution or a well-founded fear of future persecution. The respondent's own testimony was that despite her 6 day detention "the police found no evidence against her." When asked what she meant by this the respondent alleged that the police suspected her of organizing a political group to overthrown the government. Obviously, if the respondent is to be believed, the police had plenty of evidence according to the respondent's testimony of her *religious* activities: she claims they caught her red-handed having a home church meeting with 14 individuals complete with Bibles, hymnals and pamphlets. The respondent's own admission that they had no evidence against her, but that she had allegedly been caught red-handed holding a religious service, leads to the conclusion that the authorities had only minimal interest in her religious activities and ultimately no lasting suspicion of her as a political threat. These religious activities are what respondent alleges as the cornerstone of her asylum claim. And the lack of political suspicion is borne out by the record. The respondent has not explained why her husband and parents have not suffered any consequences notwithstanding her allegation that she is suspected of anti-government political activities, she failed to surrender her passport as allegedly required, and she is supposedly a fugitive from the law for failing to report to the police as required. There is not even testimony that the police have interfered in any way with her husband's transfer of money to his wife in the states. He also apparently continues to work in his private professional position without apparent interference by the government. An applicant's fear of persecution is undercut when his or her family remains in the native country unharmed. Cuadras v. United States

INS, 910 F.2d 567, 571 (9th Cir. 1990); Matter of A-E-M-, Interim Decision 3338 (BIA 1998).

Accordingly, the respondent has failed to establish eligibility for asylum, or for withholding of removal under section 241(b)(3) of the Act which requires a higher burden of proof, or for withholding of removal under the Convention Against Torture.

Both respondents will be granted voluntary departure for a period of 60 days.

ORDERS

IT IS HEREBY ORDERED that the lead respondent's application for asylum, and that of the correspondent's as derivative, is denied.

IT IS FURTHER ORDERED that the applicants' applications for withholding of removal to China under section 241(b)(3) of the Act and under the Convention Against Torture are denied.

IT IS FURTHER ORDERED that the respondents be granted voluntary departure, in lieu of removal, and without expense to the United States Government, such departure to take place on or before 60 days from the date of service of this order.

IT IS FURTHER ORDERED that each respondent shall post a voluntary departure bond in the amount of $500 with the Immigration and Naturalization Service on or before 5 business days from the date this decision is mailed, plus three business days because the decision is being mailed.

IT IS FURTHER ORDERED that, if required by the INS, the respondent shall present to the INS all necessary travel documents for voluntary departure within 60 days from the date of service of this order.

IT IS FURTHER ORDERED that, if a respondent fails to comply with any of the above orders, the voluntary departure order for that respondent shall without further notice or proceedings vacate the next day, and that respondent shall be removed from the United States to the Peoples' Republic of China on the charge(s) contained in the Notice to Appear.

WARNING TO THE RESPONDENTS: Failure to depart as required means you could be deported, you may have to pay a civil penalty of $1000 to $5000, and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for 10 years to come.

Also, if you fail to depart as required, and then fail to comply with the removal order, you could also be fined $500 for each day of noncompliance. See § 274D of the Act.

In addition, if you are removable for being deportable under section 237 of the Act, and you fail to comply with your removal order, you shall face additional fines and/or could be imprisoned for up to 4 and in some cases up to 10 years. See § 243(a) of the Act.

APPEAL RIGHTS: Both parties have the right to appeal this decision to the Board of Immigration Appeals. A written notice of appeal rights and a five-page appeals

packet, including the Notice of Appeal form, is enclosed. Any appeal must be received by the Board of Immigration Appeals at the address on the instructions page of the appeals packet within 30 calendar days of the date of service of this decision, or the appeal may be dismissed as untimely.

s/ Henry P. Ipema, Jr. 5-22-00
Henry P. Ipema, Jr.
U.S. Immigration Judge